

**THE DEATH PENALTY:  
Casualties and Costs of the War on Crime**

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As one who has often listened on National Public Radio over the years to addresses to this club and learned from those who have addressed you, I am honored to be here. As I looked at the pictures of many of the distinguished speakers who have been here before, I was reminded of Justice Brennan's comment when he was appointed to the United States Supreme Court that he felt like the mule that had been entered in the Kentucky Derby. I am not promising you that I will, in the next hour, distinguish myself quite as well as Justice Brennan did, but I want to tell you how grateful I am for the opportunity to be with you and to examine one of the most important legal and moral issues facing our country today – the use of the death penalty.

This is an appropriate time to examine the death penalty because we are using it so much today. We have the largest death row, over 3,000 men women and children under death sentence, that we have ever had in the history of the United States. One state, Texas, has already executed over 30 people this year. That is more people than Texas executed in the last three years put together. Overall our country has carried out over 60 executions this year, more than we have carried out in any year since the death penalty was reinstated in 1976. And many more executions are scheduled before the end of the year. We are executing people more, but we are examining capital punishment and the process that leads to execution less. That is something we should be concerned about.

One source of our concern should be the way the rest of the world looks at us. An article that appeared recently in the *Los Angeles Times* included the following: "Viewed from Europe, Mexico, Australia and South Africa, the 38 U.S. states that allow the death penalty are growing targets of curiosity and condemnation. Journalists from those countries who are covering death row states struggle to explain why America retains a punishment that has been abandoned by their countries and virtually every other Western Democracy."

Questions have been raised here at home as well. The American Bar Association has called for a moratorium on the use of the death penalty because of the inadequate lawyers often provided to those facing the death penalty, the prevalence of race discrimination in who is sentenced to death, the fact that mentally ill and mentally retarded people and children are being executed, and the severe limits that Congress has put on federal review of death penalty cases. The Pennsylvania Bar also called for a moratorium on the death penalty in that state because of the same concerns about how the death penalty was being used in Pennsylvania.

We should also be concerned about the large number of innocent people who have been sentenced to death. In the last 20 years, 70 people have been released from death rows after DNA evidence or other evidence established their innocence. This does not include cases where there were substantial questions of innocence but the death sentences were commuted to life in prison, or those who have been executed despite substantial questions of innocence.

The greater use of the death penalty today is very much a product of the competition among politicians to show who can be the toughest on crime. Politicians compete to show who can be most for the use of the death penalty, who can be most in favor of cutting back on review of death sentences, who can be for speeding up the process so we have faster executions, and who can be for longer prison sentences. We are now sentencing children as young as 13 years old to life imprisonment without any possibility of parole. Think about that. We are saying that a 13-year-old child is so beyond redemption that even when he gets to be 50, 60, 70 years old, he will still be locked down until the day he dies. Some states are now spending more money on their correctional systems than they are on their educational systems.

The question I would like to discuss with you today is whether we are being well served by this non-debate on crime, this political one-ups-manship. After all, we are all against crime. Nobody is in favor of crime. There is nothing more unfair, nothing more arbitrary, nothing that offends our sense of order more than random violent crime. The question is what should we do about crime. Politicians accuse each other of being soft on crime, much like they once accused each other of being soft on communism. This is pushing us toward extreme measures that we may ultimately regret.

Increasingly, the rhetoric of the crime debate invokes the image of war. We had a war on drugs. The government all but eliminated the right of our citizens to be free from searches and seizures because it had to deal with the drug problem. And now politicians are telling us that we are fighting a full scale war on crime. But the notion of war suggests a suspension of the normal rules of conduct. We need to examine some of the disturbing casualties and costs of this war on crime.

For example, when Pedro Medina caught fire while he was being electrocuted in Florida's electric chair, the attorney general of Florida, the leading law enforcement official of that state, said that he thought it was good that the electric chair malfunctioned because it sends a message to potential law breakers that they may be burned up too.

In New York, recently, two police officers rammed a plunger up the rectum of a Haitian man. It was clear that the message about the war on crime had reached the officers on the street because as they did that act they told their victim it was "Giuliani time." They recognized that the Dinkins administration was over and there was a new era in New York in terms of law enforcement and the war on crime.

In Georgia, the Governor appointed a mortician to run the prison system who took office and said that a third of the prisoners in Georgia are not fit to kill. Now 18 of his employees have testified under oath that he led raids on the prison in which people who were handcuffed or otherwise restrained were beaten.

Increasingly the language of war is employed in talking about crime. In World War II, those we were fighting were not human beings, they were "Japs." In the Vietnam War, those we were fighting were "gooks." It was acceptable to kill them. In the war on crime, we hear about people who are "subhuman," who are "predators," who are "animals," who are somehow not like us. But the reality is that they are not like us only because they are of a different race and because they are of a

different economic status.

However, the greatest casualty of this war on crime has been the sacrifice of our basic notion of fairness in terms of how we get to the results we get to in our court system. There are three things that are essential to fairness. I hope we all agree, regardless of what our position is regarding the death penalty, that these elements are critically important. One is the right to a competent lawyer. The courts cannot operate well unless the person accused is adequately defended. But we are not providing competent lawyers to those accused even in capital cases. Secondly, it is equally essential that race not play a role in how severely someone is sentenced. And finally it is absolutely essential that judges enforce the law and that judges be responsive not to the passions of the moment, not to a focus group, but to the Constitution of the United States.

Let me start by talking about counsel. I mentioned earlier that Texas has carried out far more executions than any other state. In fact, it has carried out three times more executions than the second state, Virginia, which has killed 42 people. Texas has killed well over 100 people. Houston, Texas sends more people to death than most states. If Houston were a state, it would have one of the largest death rows in the country. It has executed more people than any state in the union except for Texas itself. So to understand the death penalty, it is important to look at Houston because that is where people are being sentenced to death and those people are being executed.

The *Houston Chronicle* carried the following account of the death penalty trial of a man named George McFarland:

Seated beside his client -- a convicted capital murderer -- defense attorney John Benn spent much of Thursday afternoon's trial in apparent deep sleep.

His mouth kept falling open and his head lolled back on his shoulders, and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again.

Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of the Nov. 19, 1991, arrest of George McFarland in the robbery-killing of grocer Kenneth Kwan.

When state District Judge Doug Shaver finally called a recess, Benn was asked if he truly had fallen asleep during a capital murder trial.

"It's boring," the 72-year old longtime Houston lawyer explained.

You might think this would violate that fundamental right to counsel guaranteed to all Americans by the Sixth Amendment to the Constitution. But as the judge there explained, that does not violate the Sixth Amendment right to counsel because while the Sixth Amendment guarantees the right to a lawyer, it does not guarantee that the lawyer has to be awake. That judge is what we call a strict constructionist. That decision was recently upheld by the Texas Court of Criminal Appeals, the highest court that reviews death cases in that state.

That is bad enough, but George McFarland is not the only person who was sentenced to death in Houston at a trial in which his lawyer slept. Carl Johnson and Calvin Burdine were both sentenced to death even though their court-appointed lawyers slept during their trials. In both cases, the death sentences were upheld by the courts. This gives a new meaning to the idea of a "dream team." Carl Johnson was executed on September 15, 1995, even though his lawyer slept at his death penalty trial.

When one city -- the capital of capital punishment -- has three cases involving lawyers sleeping during trials and they are all upheld by the courts, it speaks volumes about our lack of commitment to fairness. But when we look at other places we see the same thing.

The Philadelphia Inquirer did a study of the quality of representation in Philadelphia, which rivals Houston for the number of people under death sentences. The paper reported that the quality of lawyers appointed to death penalty cases in Philadelphia was so bad that even officials in charge of the system said that they would not want to be represented in traffic court by some of those lawyers. The paper reported that Philadelphia's poor defendants often find themselves being represented by ward leaders, ward committeemen, failed politicians, sons of judges, party leaders and those who contribute to the judge's election campaign. The National Law Journal did an extensive study on the quality of representation throughout the South and found that the imposition of the death penalty was more like "a random flip of a coin than a delicate balancing of the scales" because too often the lawyer was ill prepared, ill trained, and grossly underpaid.

The lawyers appointed to defend the accused in many death penalty cases here in Ohio are paid less than the state's attorney general set aside to defend the governor for trying to take off in his airplane when Air Force One was on the runway. And that was not a terribly complicated case. But representing somebody whose life is at stake is a monumental undertaking for a lawyer. Twenty four counties here in Ohio pay less than \$20,000 to the two lawyers appointed to defend a death penalty case. If the two together spend 1,000 hours defending that case it means that they are going to be paid less than \$20 an hour; in some counties, they will be paid \$5 per hour. Most of the business people and most of the lawyers in this room know what kind of legal representation you are going to get for \$20 an hour. There is no question that there are some lawyers who rise to the challenge and provide good representation. But so often the old adage is true that we get what we pay for.

In Alabama, which sentences many people to death, the compensation for court-appointed lawyers is limited by statute to \$2,000 for time spent out of court. A lawyer who defends a case and spends just 500 hours is going to be paid \$4 an hour. I once defended a capital case and was paid so little that I could have gone to McDonald's and flipped hamburgers and made more than I made defending someone whose life was at stake. There are not many lawyers who are willing to do that. That is why this problem is not isolated to Houston, not isolated to Philadelphia, but is pervasive.

Waging a war on crime has also led us to tolerate gross racial discrimination in the criminal justice system that would not be tolerated in any other area of American life. Study after study after study documents the discrimination that takes place in the criminal justice system, from racial minorities being arrested, to being denied bail, to being sentenced to longer sentences, whether it is drug sentencing or whether it is the death penalty. One reason the Pennsylvania Bar called for a

moratorium on the death penalty in that state is that of the 210 people under death sentence in Pennsylvania, 130 are African Americans.

The criminal justice system is the part of our society that has been least affected by America's civil rights movement. When I travel around the country, I see changes in the schools in terms of racial diversity in the teaching and administrative staff. I see changes in the hospitals and the county commissions and the city councils -- not perhaps as much change as we should have -- but some change. Some people of color are involved. But when I go to the courthouse, the judges are white, the prosecutors are white, the defense lawyers are white. The only African American involved in a recent capital trial in Columbus, Georgia, was a young man named Jimmy White, an African American from Detroit accused of the murder of a white person. In a community that is 35% black, the only person of color in the front of the courtroom was Jimmy White. The jury was all white, the judge was white, the prosecutors and the defense lawyers were white.

There are communities like Danville, Virginia, that since it was incorporated in 1890 has never sentenced a white person to death. Every single person sentenced to death in Danville, Virginia, to date has been African American.

In carrying out the war on crime, some have even been willing to sacrifice an independent judiciary and the rule of law. As I said earlier, we expect judges to follow the law. We expect judges to make decisions undisturbed by the clamor of the multitude; decisions based not on public opinion, but based on the law.

Yet immediately after Penny White was voted off the Tennessee Supreme Court last year in a retention election that was nothing but a referendum on the death penalty, Governor Don Sundquist said, "should a judge look over his shoulder [when making decisions] about whether they're going to be thrown out of office? I certainly hope so." And just in case the message was lost, he pointed out that the other four members of the court would be on the ballot in two years. This is quite a contrast with what Justice John Paul Stevens of the United States Supreme Court said at the American Bar Association a couple years ago: that it was never contemplated that the individual who was to protect our rights, the judge, would make decisions based upon what would produce the most votes.

Not long ago, Charles Campbell, a conservative judge on the Texas Court of Criminal Appeals happened to be the judge who wrote an opinion reversing a death penalty case. It got a lot of publicity. Campbell was challenged in the next election by Steven Mansfield, who ran on a three-plank platform: greater use of the death penalty, greater use of the harmless error doctrine, and fines for lawyers who file frivolous appeals in death penalty cases.

Mansfield had never served in any judicial office. Campbell was a three-term incumbent on the court, a former prosecutor from Houston. Before the election, the media in Texas reported that Mansfield had lied about things like where he was born. He said he had never run for office before when he had actually run for Congress in New Hampshire. He said he had extensive criminal law experience when indeed he had virtually none. He had even been fined for practicing law without a license in Florida. Nevertheless, on election day, he got 54% of the vote. He is now Judge Steven Mansfield. As the local legal newspaper said the day after the election, he was "an unqualified

success."

This same thing has happened in state after state. In California, the governor said if the judges did not change their votes in death penalty cases he would campaign to vote them out of office. And three justices were voted off the court. In Mississippi, Tennessee, and in other states the same thing has happened. We do not have an independent judiciary when judges know that by deciding a case a certain way they will be signing their own political death warrant.

Some judges will stand up despite that pressure but we all know that many of our elected judges will not. A judge spoke recently to my class at Emory and said we all know when we make these controversial decisions what the impact is going to be when we run for office. And now members of Congress are even suggesting that we should impeach federal judges for unpopular decisions. There have been petitions circulating in Tennessee supported by a congressman from Tennessee, supported by one house of the Tennessee legislature, to impeach federal Judge John Nixon because of a decision that he made in a death penalty case.

It is not surprising that this system is not always giving us just results. Justice Stevens pointed out that recent developments in scientific evidence have made it possible to conclusively establish now that a number of innocent people have been sentenced to death. In Illinois, more people have been released from death row because they are innocent than have been executed. Recently the United States Department of Justice published a study called "Convicted by Juries, Exonerated by Science." It is not about death penalty cases but describes a number of criminal cases in which people were convicted and found guilty beyond a reasonable doubt by jurors, but have now been freed because of DNA evidence which established that they were not the perpetrator of the crime.

What has been so disturbing has been that so often those people have been freed not because of the legal system, but because the media has exposed the injustice. In the recent case in Illinois in which four people were released after 18 years in prison, one of whom had been on death row, they were exonerated because of work done by a journalism professor at Northwestern and his class. What does that say about our legal system? Since the time that the man under death sentence was exonerated by DNA evidence, another person has confessed to the crime.

It used to be unthinkable that we would execute an innocent person. But now many proponents of capital punishment say it is acceptable to execute an innocent person. Representative Bill McCollum from Florida said recently that he did not think there was any question that some day somebody who was innocent would be executed, but that is just a risk we have to accept. We have gone from the concept that it was better that the guilty go free than that an innocent person be convicted, to the notion that innocent people who may be executed are acceptable casualties in the war on crime.

And what do we have to show for it? A system that embarrasses us before the rest of the world. States like Michigan that do not have the death penalty do not have higher rates of homicide than those jurisdictions which do. Of course, most industrialized countries have done away with the death penalty. But it has come to the point that it is more important to get on with executions than determining whether convictions and sentences were fairly and reliably obtained. This is an

enormous cost of this war on crime. Such a system produces results. There is no question about that. It produces convictions and death sentences. But it does not produce justice.

In Robert Bolt's play "A Man for All Seasons," a young man argues as many of our politicians argue today with Thomas More. He tells Thomas More that he would be willing to ignore any laws that are inconvenient or unpopular. Indeed, he would cut down every law in England to pursue the devil. Thomas More replies: "Yes, and when the last law was down, and when the devil turned on you, where would you hide with all the laws being flat? This country is planted thick with laws. Do you really think you could stand upright in the winds that would blow?"

We must start asking these questions and assessing the casualties and costs of the way we are waging this war on crime. We must realize that in this war on crime, we are fighting a war against our own people. We are fighting a war against our own children. Since 1990, only five countries in the world have executed children. That is those who are under 18 at the time of the crime. Those nations are the United States, Saudi Arabia, Iran, Iraq, and Yemen. Of those five countries, not the company we usually keep, the leader is the United States of America. It is hard to lecture China on human rights when you lead the world in the execution of children. This war on crime is not a war like Viet Nam where we can declare victory and go home.

Justice Thurgood Marshall once said that the measure of a country's greatness is its ability to retain its compassion in times of crises. We are not measuring up to that standard. We must recognize that to deal with crime, we cannot just talk about who is the toughest, who can lock people up for the longest, who can bring about the most executions. We must deal with fundamental questions like whether we can deny so many of our children education, opportunity, and even hope, and then somehow scare them into behaving themselves with draconian punishments. Finally, we must recognize that as long as our courts are courts of vengeance, they will not be courts of justice.